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No. 83-5942

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1983

JOHN HENRY KNAPP,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF ARIZONA

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MARTONE, MEYER HENDRICKS & VICTOR

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After the petition for a writ of certiorari was filed, this Court handed down its decision in Michigan v. Clifford, 52 U.S.L.W. 4056 (Jan. 11, 1984), reaffirming that the Fourth Amendment warrant requirement is applicable to searches of houses damaged by fire and further defining the circumstances justifying warrantless intrusions. The Clifford decision confirms that the courts below misapplied the law in this case.

Prior to his first trial Petitioner Knapp asked for an evidentiary hearing on the circumstances under which items had been seized by fire and police officials in warrantless searches of petitioner's fire-damaged residence on successive occasions after the day of the fire. The trial court viewed a suppression hearing as unnecessary, holding that no warrant was required because police had properly taken possession of the

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premises as evidence and petitioner and his wife did not live there after the fire. 8/7/84 R.T. at 96; 8/8/74 R.T. at 3.

In the post-conviction proceeding at issue here, the trial court likewise declined to hold an evidentiary hearing and held categorically that all the warrantless searches and seizures, both on the day of the fire and thereafter, were constitutional. Appendix II to Petition for Writ of Certiorari. With respect to some, but not all, of the evidence, the court found that the error, if any, in admitting the evidence was harmless. Id.

Clifford permits a warrantless search to extinguish a fire and determine its cause but not to conduct a post-fire arson investigation. In petitioner's case firemen entered his residence to extinguish the fire and ascertain its cause, but arson experts were also called in to conduct a criminal investigation on the day of the fire and thereafter. Because no suppression hearing was held below, the record does not make clear what evidence was seized pursuant to the initial entry and what was seized pursuant to the arson investigation.

The State's recitation of facts in its response to the certiorari petition may create the impression that a suppression hearing was held. The State's narrative is gleaned from the second trial, which took place after the disputed evidence had been held admissible. Questioning by the prosecution and defense did not focus upon who conducted the searches or their purpose or whether officials were continuously present.

The categorical approach adopted by the courts below is impermissible both under Clifford and under prior rulings from this Court, and because the state did not ask for or conduct an evidentiary hearing it cannot meet its burden of proving that exigent circumstances justified dispensing with the warrant requirement. To determine how Clifford and its predecessors

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apply to this case, an evidentiary hearing will be necessary.

In its response the State argues that petitioner waived his right to challenge the admission of evidence seized on the day of the fire.* The same argument was made to the Maricopa County, Arizona, Superior Court, but no finding of waiver was made. Appendix II to Petition for Writ of Certiorari. Instead, the Court reached the merits and rejected petitioner's constitutional argument. Without a finding of waiver, there is no adequate and independent state ground barring review by this Court. Wainwright v. Sykes, 433 U.S. 72, 81 (1977).

Because the court below applied an incorrect legal standard, petitioner requests that his petition for certiorari be granted, that the judgment under review be reversed, and that the case be remanded for further proceedings not inconsistent with Michigan v. Clifford.

Alternatively, petitioner requests that the judgment below be vacated and that the case be remanded for reconsideration in light of Michigan v. Clifford.

DATED this 3rd day of February, 1984.

MARTORI, MEYER, HENDRICKS & VICTOR
A Professional Association

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*Most of the arguments the State makes in its response were also made in its Opposition to Petitioner's Stay of Execution in Case No. A-358. Those arguments were answered in petitioner's reply. Petitioner's execution was stayed by the United States District Court, District of Arizona, after petitioner filed a habeas corpus petition raising non-Fourth Amendment issues.

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AFFIDAVIT OF SERVICE

JAMES E. SCARBORO, being first duly sworn, upon oath deposes and says:

That he is a member of the Bar of this Court and that in accordance with Rule 28.2, Supreme Court Rules, the following documents were deposited with Federal Express for mailing, to the Clerk, Supreme Court of the United States, Washington, D.C. 20543, and were deposited in a United States post office for mailing, with first-class postage prepaid, to Crane McClennen, Assistant Arizona Attorney General, 1275 West Washington, Second Floor, Phoenix, Arizona 85007, on this 3rd day of February, 1984.

(a) Reply to Response to Petition for Writ of Certiorari to the Superior Court of the State of Arizona; and

(b) Affidavit of Service

James E. Scarboro
JAMES E. SCARBORO

SUBSCRIBED AND SWORN to before me this 3rd day of February, 1984, by James E. Scarboro.

Notary Public

My Commission Expires:

My Commission Expires Feb 22 1987

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